

Morales Bonilla (Migration) [2020] AATA 2546 (11 May 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Francy Estela Morales Bonilla
CASE NUMBER:	1805359
DIBP REFERENCE(S):	BCC2015/4020652 BCC2018/1010398
MEMBER:	John Longo
DATE:	11 May 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa: • cl.820.221(3) of Schedule 2 to the Regulations; and • cl.820.211(1) of Schedule 2 to the Regulations.

Statement made on 11 May 2020 at 1:34pm

CATCHWORDS

MIGRATION – Spouse (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine spousal relationship now ceased – family violence – abuse, manipulation and threat to kill – final interventional order issued by court – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), rr 1.15A, 1.21, 1.23, Schedule 2, cls 820.211, 820.221

CASE

He v MIBP [2017] FCAFC 206

Muliyana v MIAC (2010) 183 FCR 170

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 16 February 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 December 2015 on the basis of her relationship with her sponsor, Mr Jose Silva. At that time, Class UK contained Subclass 820. The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.820.211 and 820.221 which require that at the time of application and decision, the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl.820.211(8) or (9) and 820.221(3)(a) and (3)(b)(i). The applicant claims this occurred in this case.
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl.820.211(2) because the delegate was not satisfied that there was a mutual commitment to a shared life between the applicant and the sponsor.
5. The applicant appeared before the Tribunal on 13 March 2020 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Cabella. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. In the present case, the applicant claims the relationship with Mr Silva, the visa sponsor, has ceased, and she has been the victim of family violence. The Tribunal notes that the family violence need not have caused or contributed to the cessation of the spousal relationship, nor need it have occurred before the relationship ceased, but it must have existed: *Muliyana v MIAC* (2010) 183 FCR 170.
8. The primary criteria to be satisfied at the time of application are that the applicant is not the holder of a Subclass 771 (Transit) visa and that she meets one of the alternate requirements set out in cl.820.211(2), (5), (6), (7), (8) or (9): cl.820.211(1).
9. The Tribunal has reviewed the applicant's movement records which also detail her visa status at various times. The Tribunal is satisfied that the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application. Therefore, the Tribunal finds that cl.820.211(1)(a) is met.
10. The subclause relevant to the applicant's circumstances is cl.820.211(2). The key issue for determination is whether, at the time of application on 23 December 2015, the applicant was the spouse of the sponsor.

Whether the parties are in a spouse or de facto relationship

11. Clause 820.211(2)(a) requires that, at the time the visa application was made, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The applicant claims to be the de facto partner of the sponsor who is an Australian citizen. The Tribunal notes that a certified copy of the sponsor's Australian passport is on the Department's file. The Tribunal is satisfied that the sponsor is an Australian citizen.

12. Are the parties in a spousal relationship?

13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d).
14. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and the sponsor were married by proxy on 4 February 2015. A copy of the parties' Certificate of Marriage is on the Department's file. The Tribunal is satisfied that the party's proxy marriage was a valid marriage when solemnised in Chile and therefore, on the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

16. Consideration of the r.1.15A(3) factors

17. In assessing these issues, the Tribunal has had regard to all documents on the Department's and the Tribunal's files as well as the oral evidence given at the hearing.

18. The financial aspects of the relationship

19. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
20. There is no evidence before the Tribunal that the parties jointly own real estate or other major assets. There is some evidence of assets that are shared jointly, including a joint bank account. In addition, the applicant stated that both she and the sponsor had access to each of their personal accounts. The applicant stated that they were residing in office of housing accommodation in the sponsor's name. She stated that she bought a car but the vehicle was registered in the sponsor's name as he received a concession on the registration of the vehicle. She only drove the vehicle on three occasions. The applicant stated that the sponsor had his own vehicle and she was unsure if she was nominated on his insurance to drive this car.

21. The applicant stated that the sponsor paid for her son's student visa application to Australia. The applicant stated that the sponsor was paying for the expenses such as rent, food and utilities. When she started working, the applicant stated that she contributed to some of these costs, including telephone and food expenses.
22. The applicant stated that her and her sponsor purchased a food van together with a friend of the sponsor which they intended to operate but due to personal issues between the sponsor and the other partners, the van was sold soon afterwards. The applicant's witness stated that she was involved in the venture and confirmed that while sales were good, there were problems with the relationship between the partners, with the sponsor becoming jealous and not wanting to go to work. She stated that after this venture, she commenced employment. She stated that the sponsor would drive her to work.
23. There is limited evidence before the Tribunal that either person in the relationship owes any legal obligation in respect of the other. The applicant did not indicate to the Tribunal that they had wills. With respect to any pooling of financial resources and any sharing of day-to-day household expenses, the applicant gave consistent evidence about their financial arrangements. The applicant also gave consistent oral evidence about their own employment at the time of the hearing.
24. While the Tribunal notes that the applicant has submitted minimal documentary evidence in support of these claims, the documentary evidence provided does support a comingling of the applicant and sponsor's financial affairs and the sharing of financial resources freely and without limits. The Tribunal found the applicant's oral evidence to be credible, and accepts her evidence. Accordingly, the Tribunal finds that, at both the time of application and at the time of this decision, the applicant and the sponsor pooled their financial resources to some extent and shared their day-to-day household expenses.
25. The Tribunal gives positive weight to the evidence of the financial aspects of the relationship.

26. *The nature of the household*

27. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household. There is no evidence before the Tribunal that the applicant and sponsor have children to whom they are responsible, as their children are now all adults.
28. The applicant gave consistent oral evidence that they commenced living together in July 2015 when the applicant arrived in Australia.
29. The applicant also gave consistent oral evidence about the sharing of the responsibility for housework, at the time of application. She stated that they would do the shopping together. She stated that she assisted the sponsor with his medication and attended appointments with him. She also stated that the sponsor maintained the garden and the vehicles.
30. The Tribunal gives some positive weight to the evidence of the nature of the household.

31. *The social aspects of the relationship*

32. Whether the persons represent themselves to other people as being in a de facto relationship with each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.

33. The Tribunal has reviewed and considered the Form 888 statutory declarations and additional statements that have been made by the applicant and the sponsor's friends in support of the relationship. The Tribunal notes that most of this evidence was before the delegate. In addition to the statements, the applicant submitted numerous photographs of the applicant and the sponsor at social events, including here and overseas. The applicant gave evidence of their mutual involvement in social activities, including walking, shopping and attending the Preston Market. She stated they attended social events, including the celebration of the sponsor's birthday, which was attended by friends. The evidence and opinions of the applicant's friends and acquaintances about the nature of the relationship in support of the application shows that the applicant and the sponsor represent themselves as a couple to both friends and acquaintances and the level of joint social activities undertaken by the parties. The Tribunal heard oral evidence from the applicant and sponsor's mutual friend, who gave evidence of the relationship regarding their socialising and starting a business venture together.
34. In view of the evidence before the Tribunal, the Tribunal places positive weight on the evidence of the social and public recognition of the relationship.
35. *The nature of the persons' commitment to each other*
36. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
37. The Tribunal notes that the applicant and the sponsor each made statements which are on the Department's file. At the hearing, the applicant provided a consistent account of the inception and development of their relationship. The evidence before the Tribunal is that the parties were in an exclusive and committed relationship, having first met in Santiago, Chile, in April 2014. The Tribunal gives positive weight to the evidence of the duration of the relationship as well as the length of time during which the persons have lived together. The applicant also gave evidence that they were always together and that they did all activities jointly.
38. With respect to the degree of companionship and emotional support that the persons drew from each other and whether the persons see their relationship as long term, the Tribunal notes the applicant's oral evidence to the Tribunal of the history of their relationship. The applicant gave consistent evidence of their mutual enjoyment of activities and culture, which was the basis on which they met. The Tribunal also notes the applicant's evidence of their desire to travel together to the Philippines and having her two other children join them in Australia. The applicant also spoke of their desire to marry in Australia, which they did not do after being told that they could not marry again.
39. The applicant described assisting the sponsor manage his medical conditions, including assisting with his medication and attending appointments. The applicant also stated in her written submissions that he required hospitalisation in December 2016 and that she was went to hospital due to an overdose of sleeping tablets.
40. The Tribunal notes that the applicant gave credible and consistent oral evidence at the hearing about all of these and related matters. The Tribunal considers that the evidence exemplifies their mutual companionship and emotional support. The Tribunal gives positive weight to all of this evidence.
41. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s.5F(2)(a) of the Act.

42. After considering all the evidence before it and for the reasons given with respect to the r.1.15A(3) matters, the Tribunal is satisfied that, at the time of the application, the applicant and the sponsor:

- had a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
- had a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
- lived together and not separately and apart on a permanent basis.

43. Given these findings, the Tribunal is satisfied that the requirements of s.5F(2) were met at the time of the application.

44. Time of application and time of decision requirements

45. The sponsorship requirements in cl.820.211(2)(a)(ii) and cl.820.211(2)(c) must also be satisfied, and, if the applicant was not the holder of a substantive visa at the time of application, then the requirements in cl.820.211(2)(d) must also be satisfied.

46. Mr Silva completed a sponsorship for a partner to migrate to Australia form as the applicant's partner and sponsor. The form declared that he would support the applicant and would continue to do so. Accordingly, the Tribunal is satisfied that the applicant was sponsored by Mr Silva and that cl.820.211(2)(c)(i) is met. The Tribunal also finds that Mr Silva was not prohibited by cl.820.211(2B) from being a sponsoring partner. Accordingly, the Tribunal also finds that cl.820.211(2)(a)(ii) is met.

47. The applicant's movement records evidence her as having been granted a Visitor (Class FA) Subclass 600 visa on 26 July 2015. She held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 23 December 2015. As the applicant held a substantive visa at the time of application, the further requirements in cl.820.211(2)(d) need not be met. The Tribunal finds that the applicant meets the time of application requirements in cl.820.211(1) as she meets the requirements in cl.820.211(1)(a) and (b), the latter on the basis of meeting all the requirements in cl.820.211(2).

48. However, the requirements in cl.820.221(1)(a) must also be satisfied, if the Tribunal is to determine that the applicant continues to meet the requirements at the time of the decision. The Tribunal finds that, at the time of this decision, and based on the findings of fact discussed in these reasons above, the applicant continues to meet the time of application requirements in cl.820.221(1)(a) at the time of decision.

49. Has the applicant suffered family violence?

50. On the basis of the evidence, the Tribunal is satisfied the applicant and the sponsor were in a spousal relationship and that this relationship has ceased. The only issue that arises on the evidence in this case is whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.

51. Under r.1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in r.1.21 of the Regulations. These regulations, as relevant to this decision, are extracted in the attachment to this decision. The Tribunal notes that the violence, or part of the violence must have occurred during the relationship: r.1.23(3), (5), (7), (12) and (14) of the Regulations.

52. In the present case the applicant is seeking to establish family violence on the basis of evidence tested before a Court. Acceptable forms of court tested evidence are: a court injunction under the *Family Law Act 1975*; an Australian Court order for the protection of the alleged victim; or a conviction or finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim. Where such evidence is provided, the alleged victim is taken to have suffered family violence and the alleged perpetrator is taken to have committed family violence: r.1.23(1) of the Regulations.
53. On the applicant's claims, the only relevant form of evidence is a Court Order. The applicant provided the Department with a copy of a Final Intervention Order dated 9 October 2017. The applicant stated that the sponsor did not attend the hearing of the final order. The Tribunal is satisfied that a court order was made against the sponsor for the protection of the applicant from violence which occurred while they were in a married relationship. The Tribunal is also satisfied that the sponsor had an opportunity to be heard or otherwise make submissions to the Court in relation to the matter, as they were served the interim intervention order and were present when the final order was made. Therefore, family violence is taken to have occurred under r.1.23(1) of the Regulations.
54. The applicant stated in her statutory declaration that the relationship between her and the sponsor was very good until around 2015 when the applicant states that the sponsor started becoming emotionally and verbally abusive. She stated that he was verbally abusive towards her but towards the end of 2016 the abuse became physical. She stated that she woke to his hands around her neck. The sponsor stated that he dreamt he was attacking someone else. On another occasion he bit her on the hand. The pattern of abuse and manipulation continued, she stated, which culminated with the sponsor threatening to kill her.
55. The applicant's written evidence stated that the sponsor became paranoid, aggressive and jealous of other men. The applicant stated that he was verbally abusive and that he threw her out of the house on a number of occasions. The applicant stated that the sponsor's behaviour was also directed to others and that he would then accuse her of taking their side. The applicant stated that after having paid for her son's student visa to Australia, he asked her to repay him even though she did not have the money to do so at the time. The applicant stated that when she left the house due to the family violence, she sold the vehicle she had purchased. The Tribunal is satisfied that these incidents of family violence occurred when the applicant and sponsor were in a married relationship and were the basis on which the applicant was granted an intervention order on 9 October 2017.
56. As the relationship between the applicant and sponsor has ceased, and the applicant has suffered family violence committed by the sponsor, the applicant meets the requirements of cl.820.221(3). Given these findings, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for the visa.

DECISION

57. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 820 visa:
- cl.820.221(3) of Schedule 2 to the Regulations; and
 - cl.820.211(1) of Schedule 2 to the Regulations.

58.

John Longo
Member

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.21 Interpretation

...

non-judicially determined claim of family violence has the meaning given by subregulations 1.23(8) and (9).

relevant family violence means conduct, whether actual or threatened, towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of the alleged victim; or
- (e) the property of a member of the family unit of the alleged victim; or
- (f) the property of a member of the family unit of the alleged perpetrator;

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.

...

violence includes a threat of violence.

...

1.23 When is a person taken to have suffered or committed family violence?

- (1) For the purposes of these Regulations:

- (a) a person (the alleged victim) is taken to have suffered family violence; and
- (b) another person (the alleged perpetrator) is taken to have committed family violence in relation to the alleged victim.

Note Schedule 2 sets out which visas may be granted on the basis of a person having suffered family violence. The criteria to be satisfied for the visa to be granted set out which persons may be taken to have suffered family violence, and how those persons are related to the spouse or de facto partner of the alleged perpetrator mentioned in this regulation.

Circumstances in which family violence is suffered and committed — injunction under Family Law Act 1975

- (2) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if, on the application of the alleged victim, a court has granted an injunction under paragraph 114(1)(a), (b) or (c) of the Family Law Act 1975 against the alleged perpetrator.
- (3) For subregulation (2), the violence, or part of the violence, that led to the granting of the injunction must have occurred while the married relationship between the alleged perpetrator and the spouse of the alleged perpetrator existed.

Circumstances in which family violence is suffered and committed — court order

- (4) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) a court has made an order under a law of a State or Territory against the alleged perpetrator for the protection of the alleged victim from violence; and
 - (b) [...] order was made after the court had given the alleged perpetrator an opportunity to be heard, or otherwise to make submissions to the court, in relation to the matter.
- (5) For subregulation (4), the violence, or part of the violence, that led to the granting of the order must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — conviction

- (6) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if a court has:
 - (a) convicted the alleged perpetrator of an offence of violence against the alleged victim; or

- (b) recorded a finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim.
- (7) For subregulation (6), the violence, or part of the violence, that led to the conviction or recording of a finding of guilt must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

Circumstances in which family violence is suffered and committed — non-judicially determined claim of family violence

- (8) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim and the alleged perpetrator have made a joint undertaking to a court in relation to proceedings in which an allegation is before the court that the alleged perpetrator has committed an act of violence against the alleged victim.
- (9) For these Regulations, an application for a visa is taken to include a non-judicially determined claim of family violence if:
 - (a) the applicant seeks to satisfy a prescribed criterion that the applicant, or another person mentioned in the criterion, has suffered family violence; and
 - (b) the alleged victim is:
 - (i) a spouse or de facto partner of the alleged perpetrator; or
 - (ii) a dependent child of:
 - (A) the alleged perpetrator; or
 - (B) the spouse or de facto partner of the alleged perpetrator; or
 - (C) both the alleged perpetrator and his or her spouse or de facto partner; or
 - (iii) a member of the family unit of a spouse or de facto partner of the alleged perpetrator (being a member of the family unit who has made a combined application for a visa with the spouse or de facto partner); and
 - (c) the alleged victim or another person on the alleged victim's behalf has presented evidence in accordance with regulation 1.24 that:
 - (i) the alleged victim has suffered relevant family violence; and
 - (ii) the alleged perpetrator committed that relevant family violence.
- (10) If an application for a visa includes a non-judicially determined claim of family violence:
 - (a) the Minister must consider whether the alleged victim has suffered relevant family violence; and
 - (b) if the Minister is satisfied that the alleged victim has suffered the relevant family violence, the Minister must consider the application on that basis; and
 - (c) if the Minister is not satisfied that the alleged victim has suffered the relevant family violence:
 - (i) the Minister must seek the opinion of an independent expert about whether the alleged victim has suffered the relevant family violence; and
 - (ii) the Minister must take an independent expert's opinion on the matter to be correct for the purposes of deciding whether the alleged victim satisfies a prescribed criterion for a visa that requires the applicant for the visa, or another person mentioned in the criterion, to have suffered family violence.
- (11) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is satisfied under paragraph (10)(b) that the alleged victim has suffered relevant family violence.
- (12) For subregulation (11), the Minister must be satisfied that the relevant family violence, or part of the relevant family violence, occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.

- (13) The alleged victim is taken to have suffered family violence, and the alleged perpetrator is taken to have committed family violence, if:
 - (a) an application for a visa includes a non-judicially determined claim of family violence; and
 - (b) the Minister is required by subparagraph (10)(c)(ii) to take as correct an opinion of an independent expert that the alleged victim has suffered relevant family violence.
- (14) For subregulation (13), the violence, or part of the violence, that led to the independent expert having the opinion that the alleged victim has suffered relevant family violence must have occurred while the married relationship or de facto relationship existed between the alleged perpetrator and the spouse or de facto partner of the alleged perpetrator.